STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ARTHUR JEMISON,

Defendant-Appellant.

Supreme Court No. 157812
Court of Appeals No. 334024
Circuit Court No. 15-10216-01

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AMICUS' BRIEF IN SUPPORT OF DEFENANT-APPELANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISTICTION

Amicus concurs with Defendant's statement of appellate justification.

QUESTION PRESENTED

WAS MR. JEMISON DENIED HIS CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM WHEN THE PROSECUTION'S DNA EXPERT WAS ALLOWED, OVER OBJECTION, TO TESTIFY AT TRIAL VIA TWO-WAY VIDEO TRANSMISSION?

Court of Appeals answers "no."
Defendant-Appellant answers "yes."
Plaintiff-Appellee answers "no."
Amicus answers "yes."

STATEMENT OF INTEREST

Richard D. Friedman submits this brief as *amicus curiae* in support of the application for leave to appeal. As stated in the accompanying motion, *amicus* is an academic, much of whose writing and research has focused on the Confrontation Clause of the Sixth Amendment to the United States Constitution. He believes the decision of the court of appeals in this case is a mistaken application of basic principles underlying the confrontation rights of criminal defendants.

FACTUAL SUMMARY

The accused in this case was convicted of first-degree criminal sexual conduct and sentenced to a long prison term, with a minimum of twenty-two years. Among the evidence against him was the testimony of Derek Cutler, a forensic DNA analyst, regarding a male DNA profile he had developed from a vaginal swab taken from the alleged victim. But Cutler, who was employed by a Sorenson Forensics, a company in Utah, did not testify live at trial. Over the accused's objections, Cutler testified by Skype, described by the court of appeals as "a real-time, two-way interactive videoconferencing service." *People v. Jemison*, unpublished opinion *per curiam* of the Michigan Court of Appeals, issued April 12, 2018 (Docket No 334024), p 4. The trial court concluded that this was an adequate substitute for live testimony, because Cutler could see and be seen in the courtroom and it was technologically feasible to show tangible materials to him. It does not appear that any case-specific factors affected the trial judge's determination, other than that Cutler was far away and that he was an expert witness, meaning that "all emotions are gone." *Id.* at 5.

The court of appeals held the procedure constitutionally appropriate. Quoting *People v. Pesquera*, 625 N.W.2d 407 (2001), one of its precedents from before the transformational decision of *Crawford v. Washington*, 541 U.S. 36 (2004), the court asserted that the Confrontation Clause has four requirements:

> (1) a face-to-face-meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.

People v. Jemison, unpublished opinion *per curiam* of the Michigan Court of Appeals, issued April 12, 2018 (Docket No 334024), p 5.

Cutler was indeed competent and testified under oath, and the defense was afforded an opportunity to cross-examine by Skype. Further, the court of appeals held, "[t]he jury was able to observe the expert as he responded to questions." Accordingly, the court concluded: "Because the testimony met three of the Confrontation Clause criteria, and the trial court appropriately dispensed with the face-to-face requirement, defendant's right to confrontation was not violated."[1] *Id.* at 6. In other words, there are four requirements, but if the state satisfies the last three (or at least satisfies them in this way), good enough.

SUMMARY OF ARGUMENT

This court should not depart from the fundamental principle that the confrontation right requires an opportunity for the accused to have adverse witnesses testify against him face to face. If a system of "virtual confrontation," by testimony given remotely and transmitted electronically, is to be allowed, it should be the United States Supreme Court that makes that decision. To date, that Court has made no such decision outside the limited context of testimony by children, and even there the continuing validity of a system of remote testimony is in substantial doubt. An extra-judicial decision by the Court not to transmit a proposed rules change suggests that virtual

[1] Perplexingly, the court had earlier said that it agreed with the accused's contention that the procedure violated the confrontation right, but that it found that the error was harmless. But the court never offered a harmless-error analysis of the particular case, as required by *Delaware v Van Arsdall*, 475 U.S. 673, 684 (1986) ("factors [in determining harmlessness of a Confrontation Clause violation] include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case"). Rather, the rationale of the court of appeals appears to be a general determination that, while satisfying all four criteria is desirable, if the last three are satisfied the first can be excused.

confrontation does not satisfy the Confrontation Clause. Furthermore, scientific knowledge has not advanced to a state at which courts could assert with confidence that virtual confrontation is a full substitute for actual confrontation. Moreover, if this Court were to allow virtual confrontation in some cases, it should do so cautiously, and only in exigent situations. This case falls far short of that standard. Finally, if virtual confrontation is to be allowed, this Court should first prescribe a careful protocol as to how it should be conducted.

ARGUMENT

I. THIS COURT SHOULD NOT DEEM VIRTUAL CONFRONTATION TO SATISFY THE CONFRONTATION CLAUSE OUTSIDE THE CONTEXT OF CHILDREN'S TESTIMONY.

The right of the accused to have adverse witnesses brought face to face with him is not a collateral matter but at the core of the confrontation right. *See, e.g, California v. Green*, 399 U.S. 149, 157 (1970) ("it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Crawford*, 541 U.S. at 43-45 (noting that the right "is a concept that dates back to Roman times" and, focusing on 16th and 17th centuries, reciting demands of accused persons that adverse witnesses be brought face to face and treason statutes guaranteeing the right). Indeed, the right to have witnesses brought face to face is much older than the right of cross-examination; the former was a clear feature of ancient Roman and Hebrew systems, *see* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 141 U. PA. L. REV. 1171, 1202 (2002), while the latter was not firmly established until the middle of the 17th century. *Id.* at 1205 n.125.

In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court, by a 5-4 vote, held that in some circumstances a child witness could testify outside the immediate presence of the accused,

with the testimony transmitted electronically to the courtroom. It is important to bear in mind two essential points related to *Craig*.

First, the continuing vitality of *Craig* is in substantial doubt. *Craig* came before *Crawford*, during an era in which the United States Supreme Court treated the confrontation right as a consideration to be weighed in the balance along with others, in an attempt to ensure that only reliable evidence is admitted. *See, e.g., Craig*, 497 U.S. at 849 ("[O]ur precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." (citations, quotation marks omitted)), 850 (denial of confrontation permissible only where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."). *Crawford* took a dramatically different approach to the Confrontation Clause – narrowing its focus to statements deemed "testimonial" in nature, rather than presumptively applicable to all out-of-court hearsay, and treating it as a categorical procedural right, rather than as a loose, exception-riddled substantive screen against unreliable evidence. It is not surprising that Justice Scalia, who wrote a bitter dissent for three other justices and himself in *Craig*, wrote the majority opinion in *Crawford*, and that Justice O'Connor, author of the majority opinion in *Craig* and a pre-eminent balancer, was one of two justices who declined to join the majority opinion in *Crawford*. *Craig* and *Crawford* concern different problems, of course. In *Craig*, the Court assumed that the Confrontation Clause required testimony under oath and subject to cross-examination, and the question was whether that had to occur in the courtroom; in *Crawford*, the question was whether the declarant's out-of-court testimonial statements, not under oath or subject to cross, could suffice, and there was no doubt that if she testified it would

be face to face with the accused. But the radically different approaches taken by the two decisions suggest that *Craig* should not survive *Crawford*.

A further suggestion that *Craig* may not survive re-examination may be derived from the Supreme Court's treatment in 2002 of a proposed amendment to the Federal Rules of Criminal Procedure that would have allowed a trial witness, in a limited set of circumstances, to give her trial testimony from a remote location, with her image presented in the courtroom by a video connection. Usually, the Court regards itself as a mere conduit for proposed Rules amendments, but the Court declined, by a 7-2 vote, to pass this one along to Congress. (Justice O'Connor was one of the dissenters; the other was Justice Breyer, who had not been on the Court at the time of *Craig*.) In an explanatory statement, Justice Scalia wrote that the majority regarded the rule as being "of dubious validity under the Confrontation Clause," Statement of Scalia, J., 535 U.S. 1159, 1159 (2002), and he added, "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Id.* at 1160; *see generally,* Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J. L. REF. 695 (2002).

For now, of course, *Craig* remains the law, and it is appropriate for this Court to continue to apply it in the particular context that it governs. But the second essential point related to *Craig* is that it is a very narrow decision. The Court's basic holding was that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." 497 U.S. at 853. And the Court elaborated:

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not

by the courtroom generally, but by the presence of the defendant.

Id at 855-56 (citations omitted).

Even if this Court could read *Craig* still to stand, despite *Crawford*, for a broader principle that electronically transmitted testimony is acceptable "where necessary to further an important state interest," *id.* at 852, the Court should proceed cautiously. As elaborated further below, however valid it might be to allow such testimony when a witness is gravely ill or overseas and beyond the power of the state to procure confrontation, there is no justification for doing so in a case like this, in which the State plainly could bring the witness to trial, or even bring the accused to the witness, but chose not to simply because it could not be bothered and wished to save money.

II. SCIENTIFIC KNOWLEDGE DOES NOT YET SUPPORT THE PROPOSITION THAT VIRTUAL CONFRONTATION IS AN ADEQUATE SUBSTITUTE FOR ACTUAL CONFRONTATION.

Amicus does not take a dogmatic view that what Justice Scalia aptly called virtual confrontation should never be held to satisfy the Confrontation Clause. *Amicus* does believe that it should not be held to do so until such time as there is a clear scientific basis for concluding that video confrontation is essentially the equivalent of actual confrontation, face to face. As of now, there is no basis for drawing this conclusion.

Three empirical questions bear on the matter. First, to what extent is there a differential in *impact on the witness* between video and actual confrontation, making it more likely that the witness will give false testimony against the accused when the confrontation is by video? Second, to what extent is there a differential in the *ability to cross-examine*? And third, to what extent is there a differential in the *jury's ability to assess the testimony*?

The first two questions are the most crucial, because the rights to be face to face with the

witness and to have an opportunity for cross-examination are categorically protected by the Confrontation Clause. If distance and a sense of insulation would make a prosecution witness testifying by video significantly more likely to testify falsely (whether intentionally or not) than if she were brought face to face with the accused, that should be the end of the matter; we should not accept a substitute for the constitutionally guaranteed right of confrontation if it is not as effective. Similarly, if (even apart from technological issues like a time lag), similar factors make it significantly more difficult for defense counsel to cross-examine effectively, that also should end the matter. The third question is less critical because the Confrontation Clause does not absolutely require that the witness testify in front of the jury, or in a way that the jury can assess her demeanor: *If* the witness is unavailable *and* the accused has had a prior opportunity for confrontation (including cross-examination), then it is permissible on traditional principles, and under *Crawford*, to present even a transcript of the witness's prior testimony. But the third question is still significant, because in some cases unavailability is a matter of degree, and whether a witness should be deemed sufficiently unavailable that remote testimony should be allowed might depend on the extent to which the jury's ability to assess the testimony is impaired by the fact that the witness is testifying by video.

Amicus believes that the burden of proof with respect to these questions must be on the prosecution. For centuries, the confrontation right has meant that prosecutors must bring their witnesses in court. If an alternative procedure is to be adopted as an adequate substitute, the prosecution must demonstrate that it is a true equivalent.

As of now, the prosecution cannot do so. On none of the three questions set out above

has there been a showing that video confrontation is the equivalent of actual confrontation.[2] Indeed, on each of the three, though research findings are far from settled,[3] there is ground for concern.[4] It appears that witnesses may be more likely to speak falsely when confrontation is by video than when the witness and accused are face to face.[5] Cross-examination may well be less

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[2] *See generally* Friedman, *Remote Testimony, supra,* 35 U. MICH. J. L. REF. at 702-03 & n.17.

[3] Though videoconferencing is now widespread, that is a relatively recent phenomenon, and so the scientific study of it, and of its effects on participants and observers, is far from mature. *See* Joey F. George & John R. Carlson *Media Selection for Deceptive Communication*, 2005 PROCEEDING OF THE 38TH HAW. INT'L CONFERENCE ON SYSTEM SCIENCES 1, 5, www.ieeexplore.ieee.org/document/1385271/ (noting that videoconferencing was the communication method respondents said they had the least experience with).

[4] It may be in some settings that video evidence is less beneficial to the prosecution than live evidence would be because the witness will tend to be less persuasive and effective by video. *See* Chris Fullwood *et al.*, *The Effect of Initial Meeting Context and Video-Mediation on Jury Perception of an Eyewitness*, 2008 INTERNET J. CRIMONOLOGY 1, 3-4, www.internetjournalofcrimonology.com (literature review, noting research support for the conclusion that video mediation may present "a barrier to successful communication," in part because of dilution of visual signals, and may lead to "negative evaluations of the witness"). That does not matter for purposes of the Confrontation Clause. What matters for the Clause is whether the accused has had a genuine opportunity for confrontation, not whether the witness was strong or weak.

[5] *See* Patrick R. Brundell, *Deception and Communication Media* 287 (unpublished Ph.D. dissertation, Nottingham University) (Sept. 2011) (http://eprints.nottingham.ac.uk/27962/1/604892.pdf), at 110-24 (concluding that, as compared to face-to-face communication, video communication is far more likely, in proportion to amount of use, to be used for deception, across a range of contexts, and noting that "[m]edia types which showed a higher likelihood of use for deception were also the media types that were judged to have a low frequency of general use."). Fullwood *et al.*, *supra* note 4, note that in the United Kingdom, where vulnerable adult witnesses as well as children are allowed to testify by video link, "it is clear that many witnesses would not give evidence if the only option was to present it in open court." *Id.* at 2. Of course, securing truthful testimony from witnesses is beneficial. But presumably many of those who would not testify in open court would be dissuaded by the presence of the accused, and the lessening of that impact when the testimony is by video means that some false testimony, as well as truthful, will be generated.

effective.[6] And the jury's ability to assess the truthfulness of the testimony may well be significantly impaired.[7]

There may come a day when courts can say with confidence that virtual confrontation is fully as satisfactory as actual confrontation. But that day has not arrived.

III. THIS IS A PARTICULARLY POOR CASE IN WHICH TO ALLOW REMOTE TESTIMONY.

If this Court is now going to countenance remote testimony by adults, it should only do so in a compelling case. Some courts have allowed remote testimony when a witness was gravely ill, *e.g., Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007) (on *habeas*), or overseas, *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), in such circumstances that the witness could not feasibly be brought to the trial. Even given such exigencies, careful courts recognize that there can be no basis for allowing remote testimony if the accused can be brought to the witness for a deposition. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (*en banc*) (holding that unwillingness of witnesses in Australia to come to the United States was insufficient to allow video evidence given that depositions in Australia, with the accused present, could have been arranged); *United States v. Prokop*, unpublished opinion of the United States District Court for Nevada, issued March 30, 2014 (Docket No. 2:09–cr–00022–MMD–GWF) (denying motion for testimony by video but granting motion for out-of-state deposition). But in this case there is no reason even to consider the possibility of a deposition, because there was no exigency preventing the witness from

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[6] *See* Fullwood *et al.*, *supra* note 4, at 3 (noting conclusion of a Scottish Office report that "[t]he video link . . . made it difficult for lawyers to cross examine the witness").

[7] *See* Fullwood *et al., supra* note 4, at 3-4 (noting that video-linked communication may make it more difficult to assess audio signals and bodily activity).

attending trial in person.[8]

Here, the witness, Cutler, was a DNA expert who worked for an out-of-state forensics company that the State had chosen to analyze the vaginal swab taken from the alleged victim. It was the State's choice to send the swab to a distant state for analysis, presumably for cost-saving purposes. Certainly the State could have decided to use a lab in or closer to Michigan. And it could have decided to contract with Sorenson Forensics, Cutler's employer, only if Sorenson agreed that Cutler would, if necessary, appear to testify at trial. As the classic repeat player in a classic repeat-player situation – a state conducting a prosecution with the aid of forensic lab analysis – the State should be accountable for not conducting its affairs in such a way that it could guarantee in advance that a witness would be readily available to testify at trial if necessary. And even if it did not do so, once it became apparent that Cutler's testimony was needed, the State could have invoked the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which has been adopted in all states, to guarantee Cutler's appearance. MCL § 767.93; Utah Code § 77-21-2. And if the State did not do even *that*, it still probably could have secured Cutler's presence at trial by offering to pay for his trial expenses; the State plainly was obligated to make the offer. *Cf. Barber v. Page*, 390 U.S. 719, 724 (1968) (endorsing statement that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff").

[8] No reason appears in *Horn* why a deposition could not have been arranged.

In short, the only reason *not* to secure Cutler's testimony at trial was to save money. Even assuming that remote testimony by an adult witness should be allowed in compelling circumstances, this case presents an extremely *un*compelling set of circumstances.

Moreover, there are affirmative reasons making this a particularly bad case for remote testimony. The accused was convicted of a serious crime, and sentenced to a minimum of twenty-two years of imprisonment; this makes it especially inappropriate to allow the cost of airfare to prevent the accused from having a full opportunity for confrontation. And Cutler's testimony, describing the development of the male DNA profile that led to identification of the accused, was plainly critical to the prosecution case.

So far as *amicus* is aware, in no other case has an appellate court allowed remote testimony on such weak facts. Indeed, in cases in which the expense and inconvenience of live testimony would be comparable to or even greater than here, appellate courts have been very firm that these are an inadequate basis for allowing remote testimony. *See, e.g.*, *State v. Johnson*, 812 S.E.2d 739 (S.C. Ct. Apps. 2018) (testimony of an investigator who was 2,500 miles away, deemed by trial court to be an "ancillary" witness; Skype testimony held improper); *State v. Rogerson*, 855 N.W.2d 495 (Iowa 2014) (holding that video testimony by out-of-state witnesses and by distant state lab employees was invalid; noting "a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation," *id.* at 507); *State v. Smith*, 308 P.3d 135, 138 (N.M. Ct. Apps. 2013) (holding that trial court erred by allowing video testimony of analyst from state lab on the basis that the analyst would have to drive several hours, resulting in the lab being shorthanded, and inconveniencing the analyst in her work; reaffirming prior decision that "a

chemist's busy schedule and inconvenience to him or his laboratory caused by traveling to testify" does not justify video testimony); *see generally Commonwealth v. Atkinson*, 987 A.2d 743, 748 (Pa. Super. Ct. 2009) (stating that "[i]n addition to child witness cases, there appear to be two situations in which courts have considered the use of video testimony for adult witnesses: when a witness is too ill to travel and when a witness is located outside of the United States"; holding that "convenience and cost-saving" are insufficient bases to allow prisoners to testify by video).[9]

This Court should therefore recognize that if it were to allow remote testimony here then it would be countenancing such testimony in a wide array of cases in which a prosecutor *could* secure the live testimony of the witness, even a highly significant one, but would rather not pay the expense, or put up with the bother, or would prefer insulating the witness from the intensity of live confrontation and cross-examination. Such a change threatens to transform the nature of criminal trials to one in which remote testimony plays a large role, largely at the discretion of the prosecutor. The Court should hesitate long and hard before taking a significant step down that path.

IV. A CAREFULLY DESIGNED PROTOCOL WOULD BE NECESSARY FOR THE PRESENTATION OF REMOTE TESTIMONY.

If virtual confrontation is to be allowed, it must be under a carefully designed protocol to ensure that the testimony is presented properly and resembles actual confrontation as closely as possible. Such a protocol would have to resolve issues such as: What minimum resolution of the

[9] Note also *Johnson v. Warden*, unpublished opinion of the United States District Court for the Southern District of Ohio, issued September 29, 2014 2014 (Docket No. 1:13–cv–82), a *habeas* case, holding that use of video testimony was reasonable to prevent witness intimidation. Intimidation is a common basis for a conclusion that the accused has forfeited the confrontation right, and arguably *Johnson* can be justified as a mitigation – preserving part of the confrontation right – of the situation created by the accused's wrongful conduct.

video transmission, both into the courtroom and into the room where the witness is, would be necessary? How large would the screens have to be, and where would they be placed? Who, if anybody, could be in the room with the witness when she testified? Where would the cameras be placed? What would they show, and with how tight a focus? Would the accused be able to look at the screen and the camera simultaneously (so as to maintain two-way, albeit video-mediated, eye contact)? The courts below appear to have shown little or no interest in these issues. If virtual confrontation is to be allowed, this Court must ensure not only that it is done only in appropriate cases but also that it is done in an appropriate manner.

CONCLUSION

For the foregoing reasons, the application for leave to appeal should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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